UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAPTIST HEALTH NURSING AND
REHABILITATION CENTER, INC.

Case 03-CA-153365
and Case 03-CA-160251

1199 SEIU UNITED HEALTHCARE
WORKERS EAST

RESPONDENT'S BRIEF IN RESPONSE TO GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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PRELIMINARY STATEMENT

On June 2, 2015 and September 18, 2015, Charging Party 1199SEIU United Healthcare Workers East (the "Charging Party" or "Union") filed two unfair labor practice charges (Cases 03-CA-153365 and 03-CA-160251) with the National Labor Relations Board, Third Region (the "Board"), alleging that Respondent Baptist Health Nursing and Rehabilitation Center, Inc. ("Respondent" or "Baptist") suspended and discharged employees[1] Carmel Sparks and Yadira Lambert without providing the Union with advance notice or an opportunity to bargain (GC-1(a) and 1(c)).[2]

On or about August 25, 2015, the Regional Director issued a Complaint and Notice of Hearing with respect to Case 03-CA-153365 (the "Complaint") (GC-1(e)).[3] On October 23, 2015, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing in Cases 03-CA-153365 and 03-CA-160251 (the "Consolidated Complaint") (GC-1(j)). On November 6, 2015, Respondent filed an Answer to the Consolidated Complaint, denying the allegations and asserting various affirmative defenses (GC-1(l)). On January 19, 2016, Respondent served an Amended Answer to the Consolidated Complaint (GC-1(o)).

On January 26 and 27, 2016, Administrative Law Judge Geoffrey Carter ("ALJ Carter") held a hearing in Albany, New York based on the allegations raised in the

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[1] The June 2, 2015 Charge also included an allegation that Respondent discharged employees Danielle Danforth and Debbie Williams without providing the Union with advanced notice or an opportunity to bargain (GC-1(a)). The Union subsequently withdrew that portion of the Charge (R-1).

[2] Exhibits received into evidence during the hearings shall be referred to in the following manner: General Counsel Exhibits as "GC-__" and Respondent Exhibits as "R-__". The Union did not enter any exhibits. References to the transcript from the hearing shall be made as "1/26 Tr. __" or "1/27 Tr. __". References to "ALJD ___:___" are to the Administrative Law Judge's Decision at page(s):line(s).

[3] On or about September 8, 2015, Respondent filed an Answer to the Complaint, denying the allegations and asserting various affirmative defenses (GC-1(g)).

Consolidated Complaint.[4] In a Decision dated March 11, 2016, ALJ Carter issued a recommended Order that the Board should dismiss the Consolidated Complaint because the Supreme Court's decision in *Noel Canning* invalidated the Board's decision in *Alan Ritchey*, reinstating *Fresno Bee* as the controlling precedent:

> I find that Respondent has the better argument. Although the Supreme Court issued its decision in *Noel Canning* on June 26, 2014, the Board has not since issued another decision to adopt or reaffirm the principles set forth in *Alan Ritchey*. Perhaps such a decision is forthcoming, or perhaps not, but until the Board acts, *Fresno Bee* remains good law.

ALJD 9:23-26. On April 8, 2016, Counsel for the General Counsel filed exceptions to ALJ Carter's Decision.

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Baptist submits this Brief in opposition to the General Counsel's Exceptions to the Decision of ALJ Carter, dated March 11, 2016. For the reasons set forth herein, the Board should reject the General Counsel's exceptions in their entirety and adopt ALJ Carter's recommendation to dismiss the Consolidated Complaint.

STATEMENT OF FACTS

A. Baptist Health and the 1199 Bargaining Unit

Baptist Health Nursing & Rehabilitation Center, Inc., a rehabilitation facility located in Scotia, New York, is a wholly owned subsidiary of Baptist Health System and

[4] At the start of the hearing, Counsel for the General Counsel (the "General Counsel") submitted a Notice of Intent to Amend the Consolidated Complaint and Notice of Hearing ("Notice of Intent to Amend"). In her Notice of Intent to Amend, the General Counsel sought to amend Paragraph V of the Consolidated Complaint to include the following individuals in the following titles as agents/supervisors of Baptist: (1) Jonathan Steffan – Director of Human Resources; (2) Megan Feuz – Director of Human Resources; (3) Katrina Davis – Supervisor; (3) Laura (last name unknown) – Supervisor; (4) Terry (last name unknown); and (5) Kerry DiMaseo – Scheduler [sic]. Due to a technical malfunction, the Parties' discussion regarding the Notice of Intent was not included in the record and the parties subsequently submitted a Joint Stipulation (attached as Appendix "A"), to memorialize Respondent's response to these allegations.

provides long-term and short-term rehabilitation services to elderly individuals (1/26 Tr. 147-148). Baptist employs approximately 300 employees (1/26 Tr. 148).

On May 4, 2015, the National Labor Relations Board certified 1199 SEIU United Healthcare Workers East as the exclusive collective-bargaining representatives of the following unit of employees:

> All full-time, regular part-time, and per diem service and maintenance employees employed by the Employer at its Scotia, New York facility, including all CNAs, maintenance/security workers, porters, laundry aides/workers, housekeeping aides/workers, ward clerks, activity aides, floor helpers, restorative associates, restorative nurse aides, transport clerks/drivers and transport aides; but excluding transport coordinators, licensed practical nurses, guards, professional employees and supervisors as defined in the Act, and all other employees (GC-2).

In or around the first week of July 2015, Baptist and the Union began negotiating an initial collective bargaining agreement (1/26 Tr. 151). Baptist and the Union have not reached an initial collective bargaining agreement, nor have they reached agreement on an interim grievance or arbitration procedure (1/26 Tr. 151).

B. Baptist's Long-Standing Non-Discretionary Policies For Attendance, Insubordination, and Job Abandonment

Baptist maintains an Employee Handbook that is applicable to bargaining unit employees (1/26 Tr. 151; R-3). The "Disciplinary Procedure" contained in Baptist's Employee Handbook identifies several forms of misconduct that "will result in immediate termination," including:

- Unexcused absences occurring more than once without prior call in – (No call/No Show);
- Insubordination; and

- Leaving the property without following proper procedure (R-3, p. 3-2).

The "Attendance" policy contained in the Employee Handbook provides:

> Because of the nature of the work at [Baptist], prompt and regular attendance is essential. If an employee is ill or going to be delayed in reporting to work, the employee must call in prior to the start of the shift. The Department Head/Supervisor will discuss the proper "call in" procedure with the employee.
>
> An employee who fails to call-in or to report when scheduled is deemed a no call/no show. The penalty for a no call/no show is a written warning notice. Any employee who receives two no call/no shows within one year, is subject to disciplinary action including termination. Any call to your department later than one hour into the scheduled shift will be recorded as a no call/no show. (R-3, p. 2-2).

The Disciplinary Policy and Attendance Policy contained in Baptist's Employee Handbook have been in effect at Baptist since at least 2009 – long before the Union was certified at Baptist (1/26 Tr. 154-155).

C. Baptist's Call-In Procedure for Certified Nursing Assistants and Baptist's Long-Standing Non-Discretionary Policy To Terminate Employees For Multiple No-Call, No-Show Absences

Baptist has three standard shifts: 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m. (1/26 Tr. 155). Each Certified Nursing Assistant ("CNA") is hired to work one of the three foregoing shifts (1/27 Tr. 369). Staffing Coordinator Kerri DeMasi is responsible for scheduling all of Baptist's non-supervisory employees, including CNAs, RNs, and LPNs (1/27 Tr. 329). Every other Wednesday, DeMasi prints off a schedule of the assigned shifts and posts it outside of her office (1/27 Tr. 329-330). The schedule covers a two-week period that begins on a Sunday and ends on a Saturday (1/27 Tr. 330).

If a CNA is unable to report for a scheduled shift, the Nursing Department requires the CNA to call-in at least two-hours in advance of his/her scheduled shift (1/26 Tr. 155; 1/27 Tr. 292, 331, 374). The CNA must call-in on the day that he or she is scheduled to work – calling in the day before the scheduled shift is not adequate and is not in compliance with Baptist's policy or practice (1/27 Tr. 260-261). Having adequate staff on hand to care for residents is of critical importance for Baptist and providing two hours advanced notice allows the Nursing Department supervisors with adequate time to fill vacancies in the schedule (1/26. Tr. 155-157). No-call/no-show absences leave units short-staffed and could compromise resident care (1/26 Tr. 157).

On weekdays, CNAs working 7 am to 3 pm shifts who are unable to report for their scheduled shift may call either a nursing supervisor in the Nursing Department, or Kerri DeMasi, the Staffing Coordinator, to report their absence for that day (1/26 Tr. 156). CNAs working 3 am to 11 pm or 11 pm to 7 am shifts on weekdays and any shift on Saturday and Sunday (when DeMasi is not working), must contact a nursing supervisor in the Nursing Department to call-in and report that s/he is unable to work a scheduled shift (1/26 Tr. 156; 1/27 Tr. 374). In accordance with the Attendance Policy set forth in Baptist's Employee Handbook, Baptist's long-standing, established practice has been to automatically terminate any employee who has two or more no-call/no show absences during the course of a one-year period (1/26 Tr. 157, 206; 1/27 Tr. 275, 292-293, 331, 374).

At the beginning of each year, Staffing Coordinator DeMasi prepares an attendance card for each employee so that Baptist can track their attendance throughout the year (1/27 Tr. 332). In those instances where an employee is a no-call,

no-show for a second time in one-year, a supervisor leaves the employee's attendance card on DeMasi's desk and instructs DeMasi to prepare a termination letter for that employee (1/27 Tr. 332, 348). DeMasi does not make the decision to terminate an employee (1/27 Tr. 348). Instead, DeMasi prepares a "stock" termination letter that is stored on her computer (1/27 Tr. 332). The letter indicates that pursuant to the Attendance Policy in the Employee Handbook, Baptist is terminating the employee for having two no-call, no-show absences within one year (*see* R-9, R-10).

DeMasi then provides the letter and the employee staffing card to the Director of Nursing with a recommendation that the Director of Nursing terminate the employee based on Baptist's Attendance Policy (1/27 Tr. 332-333, 348). The Director of Nursing reviews the employee staffing card to confirm the employee had two no-call, no-show absences and, once confirmed, she signs the termination letter and mails it to the employee (1/27 Tr. 375). During the hearing, witnesses for Baptist uniformly testified that they were unaware of a single instance where Baptist did not follow this policy and the General Counsel and Charging Party failed to offer any evidence to the contrary (1/27 Tr. 332, 348-349, 374-375).

D. Baptist Administratively Suspends and Subsequently Terminates CNA Carmel Sparks

Carmel Sparks was a part-time CNA who worked at Baptist (1/26 Tr. 157). Baptist terminated Sparks on June 3, 2015, after Sparks walked off the job without good cause in the middle of her shift and abandoned her position (1/26 Tr. 159-160).

On May 15, 2015, a nurse on Sparks' unit reported to Sherri Martone, who at the time was an Agency Nurse Supervisor at Baptist (1/27 Tr. 291),[5] that Sparks was acting in an insubordinate manner in the "Day Room" – a quiet room in the Baptist facility where residents who require more attention may be cared for (1/27 Tr. 294). Later that evening, Martone spoke with Sparks about this incident and Sparks told Martone that she had a confrontation with her Charge Nurse, Karen Comerford, and that she could not continue to work under those circumstances (1/27 Tr. 295).[6]

During this meeting, Sparks filled out a written statement of what occurred on the unit that evening and provided it to Martone (1/27 Tr. 297; GC-5). Martone told Sparks that Sparks needed to return to the Day Room and finish her shift (1/27 Tr. 295). Sparks, however, told Martone that she would not return to the unit and was leaving (1/27 Tr. 295). Martone told Sparks that if she left Baptist without finishing her shift, it would be considered job abandonment (1/27 Tr. 318).

Later that evening, Martone received a phone call from a nurse on Sparks' unit and was advised that Sparks did not return to finish her shift (1/27 Tr. 295). Thereafter, Martone completed her rounds and confirmed that Sparks did not return to her unit (1/27 Tr. 295). By leaving the unit without permission, Sparks put Baptist's residents in jeopardy and her conduct constituted job abandonment (1/27 Tr. 274, 295). Later that same night, Martone received statements from the other employees who were working on Sparks' unit that evening and provided those statements, along with the statement from Sparks, to Acting Director of Nursing Cynthia Lyden (1/27 Tr. 295-299; R-4).

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[5] Martone was an Agency Nurse Supervisor from March 13, 2015 until September 18, 2015 (GC-1(o) p. 4). Since September 20, 2015, Baptist has employed Martone as a Registered Nurse Supervisor (1/27 Tr. 291).

[6] Comerford was a Licensed Practical Nurse (LPN) and not a member of the bargaining unit (*see* GC-2).

On May 20, 2015, Sparks approached Director of Human Resources, Jonathan Steffan to discuss the incident that she had with Comerford on May 15th (1/26 Tr. 160). Sparks falsely told Steffan that on May 15, 2015, Comerford harassed and physically threatened her and that she (Sparks) left the building in fear for her safety (1/26 Tr. 160). After speaking with Sparks, Steffan immediately went to the nursing office and spoke with Comerford (1/26 Tr. 161). During Steffan's conversation with Comerford, Cynthia Lyden, the Acting Director of Nursing at the time, told Steffan that based on witness statements that were taken after the incident on May 15th, Sparks' version of what had occurred was not true and that it was Sparks who was yelling at Comerford (1/26 Tr. 161). Lyden provided Steffan with the witness statements that – other than Sparks' own self-serving statement – corroborated Comerford's account that Sparks was the aggressor toward Comerford (R-4; 1/26 Tr. 69).

Specifically, the witness statements indicated that on the evening of May 20, 2015, Sparks was assigned to the Day Room and was playing loud hip-hop music on the TV and Comerford felt as though the loud music was agitating the residents (1/26 Tr. 176-177; R-4). The witness statements further indicated that Comerford asked Sparks to turn down the music and although Sparks initially complied, within five to ten minutes, Sparks had turned the TV back on and was playing loud hip-hop music again (1/26 Tr. 177; R-4). At that point, Comerford came back into the Day Room and an altercation between Sparks and Comerford ensued, during which Sparks acted in a loud and insubordinate manner toward Comerford (1/26 Tr. 177-178).

After speaking with Comerford and reviewing the witness statements, Steffan went back to meet with Sparks and told her that he needed to look into the incident

further (1/26 Tr. 178). Steffan then told Sparks that she would be taken off the schedule until the incident could be resolved (1/26 Tr. 179). Steffan did not consider this administrative suspension to constitute a form of discipline (1/26 Tr. 179). Rather, Steffan reasoned that if Comerford had, in fact, accosted Sparks, he could not put Sparks back on the floor with her (1/26 Tr. 179). Likewise, Steffan further reasoned that if Comerford was telling the truth, and Sparks had been the aggressor, then she had acted inappropriately in front of the residents and it was not safe to put her back on the floor (1/26 Tr. 179-180).

Steffan then conducted his own independent investigation (1/26 Tr. 180). As part of that investigation, and pursuant to Sparks' request, Steffan reviewed video footage of the Day Room from that evening – this footage did not corroborate Sparks' version of the events (1/26 Tr. 180). At the conclusion of his investigation, Steffan prepared a memorandum documenting his investigation and the conclusions he reached (1/26 Tr. 183). Specifically, Steffan concluded that Sparks acted in an inappropriate and insubordinate manner toward Comerford (her supervisor) and that Sparks walked off the job without good reason (1/26 Tr. 184). Based on the fact that Sparks walked off the job without good reason – constituting Job Abandonment – Steffan concluded that Sparks must be terminated pursuant to the Disciplinary Procedure section of the Employee Handbook, that provides, "leaving the property without following proper procedure" "will result in immediate termination" (1/26 Tr. 184; 1/27 Tr. 275; R-3, p. 3-2).

On June 3, 2015, Steffan and Cynthia Lyden met with Sparks (1/26 Tr. 187). During this meeting, Steffan and Lyden informed Sparks that she was being terminated for leaving her position without following proper procedure and abandoning her job (1/26

Tr. 184, 188). Steffan presented Sparks with an Employee Termination Notice during the meeting (1/26 Tr. 190; *see* R-6). The Employee Termination Notice lists the "Violation" as "Job Abandonment – walked off job 5/5/15 mid-shift" and notes the "Basis For Termination" as "after investigation, employee was found to have argued with her change nurse and walked off floor. Carmel was advised that leaving was job abandonment" (R-6). Sparks refused to sign the Employee Termination Notice (R-6, 1/26 Tr. 190-191).

E. Baptist Administratively Suspends and Subsequently Terminates CNA Yadira Lambert

Yadira Lambert was a full-time CNA at Baptist who worked the 3:00 p.m. to 11:00 p.m. shift (1/26 Tr. 73; 1/27 Tr. 333). In early June 2015, the Director of Nursing advised Steffan that Lambert had been sent home following a disagreement between Lambert and her evening supervisor (1/26 Tr. 202). Steffan advised the Director of Nursing that she needed to investigate the incident and find out what happened (1/26 Tr. 202). Lambert was placed on administrative leave pending the outcome of the investigation (1/26 Tr. 202; *see* GC-10). Baptist did not consider this action to constitute disciplinary action and it did not issue any type of disciplinary action to Lambert because of this incident (1/26 Tr. 202-203). Lambert was returned to work on or about June 19, 2015 (GC-10).

Subsequently, in August 2015, Baptist terminated Lambert's employment after she was a no-call, no-show for the second time in a one-year period (1/26 Tr. 203-204). Specifically, Lambert was scheduled to work her regular 3:00 p.m. to 11:00 p.m. shift on July 31, 2015 (Friday), August 1, 2015 (Saturday), and August 2, 2015 (Sunday) (R-16). On July 31, 2015, Lambert called Staffing Coordinator Kerri DeMasi and told DeMasi

that she was having car trouble and would not be able to make it into work that day (1/27 Tr. 345). DeMasi told Lambert that she would take Lambert off of the schedule for Friday, July 31st, but that Lambert would need to call back the next day and speak with the Director of Nursing (Melanie Williams) if she was not going to make her shift on August 1st (1/27 Tr. 345).

On August 1, 2015, Lambert again called in and spoke with Sherri Martone and advised Martone that she was having car trouble and would not be able to report for her shift that day (1/27 Tr. 310). Martone told Lambert that she would remove her from her shift for August 1st, but that Lambert needed to call back the next day if she was not going to be able to come in for her scheduled shift on August 2nd (1/27 Tr. 310). On August 2, 2015, Lambert did not call-in or report for her scheduled shift and was thus a no-call, no-show for that shift (1/27 Tr. 313).

After Lambert's no-call, no-show on August 2nd, the nursing supervisor left Lambert's attendance card on DeMasi's desk (1/27 Tr. 336). On Monday, August 3, 2015, DeMasi arrived to work, saw Lambert's attendance card, and was made aware of the fact that Lambert was a no-call, no-show for her August 2nd shift (1/27 Tr. 336-338). At that point, DeMasi reviewed Lambert's attendance card, and confirmed that Lambert had a prior a no-call, no-show absence on April 26, 2015 (1/27 Tr. 336-338, 340-341, R-16, R-17). In accordance with her normal practice, DeMasi then prepared a termination letter for Lambert, printed it from her computer on Baptist letterhead, and provided the letter, along with Lambert's attendance card, to the current Director of Nursing, Melanie Williams for her review (1/27 Tr. 337).

On the same day, Williams reviewed the attendance card and confirmed that Lambert did, in fact, have two no-call, no-show absences during a one-year period – the first on April 26, 2015 and the second on August 2, 2015 (1/27 Tr. 376-377, R-16). Because Williams was new to the position of Director of Nursing, she then spoke with Human Resources Director Steffan to confirm that Baptist's established practice was to terminate an employee after a second no-call, no-show absence (1/27 Tr. 378). Steffan confirmed Baptist's practice with Williams who then signed and mailed out the termination letter to Lambert (1/27 Tr. 377-378, R-9). The termination letter, dated August 3, 2015, stated:

> This letter is to officially notify you that as of the above mentioned date your employment with [Baptist] has been terminated as stated in the employee handbook section 2-2 due to unexcused absences occurring more than twice in a years' time without prior call-in (no call/no show).
>
> You did not call or show up for your scheduled shifts on April 26th 2015 & August 2nd 2015.
>
> This is grounds for immediate termination. (R-9).

F. Baptist Did Not Provide the Union With Notice or an Opportunity to Bargain Prior to the Administrative Suspension or Termination of Sparks or Lambert

Based on Baptist's understanding of the law at the time, it did not provide the Union with notice or an opportunity to bargain prior to the administrative suspensions or terminations of Sparks or Lambert (1/26 Tr. 200-201, 216-217; 1/27 Tr. 378). The Union, however, did subsequently become aware that Baptist had administratively suspended and terminated Sparks and Lambert, but failed to request bargaining (1/26 Tr. 40-41, 131, 217; 1/27 Tr. 378). The Union also did not attempt to address the

administrative suspensions and terminations of Sparks and Lambert during subsequent collective bargaining sessions with Baptist (1/27 Tr. 271-272).

ARGUMENT

POINT I

IT WAS NOT NECESSARY FOR ALJ CARTER TO MAKE CREDIBILITY DETERMINATIONS IN THIS CASE AND ALJ CARTER MADE CREDIBILITY DETERMINATIONS WHERE NECESSARY

The General Counsel's Exception 1 that ALJ Carter erred by not making witness credibility determinations is baseless. It is well-established that an administrative law judge is not required to make credibility determinations where the ultimate determination in the proceeding does not depend on credibility. *See Laundry, Dry Cleaning, Industrial, Linen Supply and Dust Control Drivers Union Local 209*, 167 NLRB 45, 49 (1967) ("[B]ut since none of the ultimate determinations depend on credibility, it is unnecessary to resolve the possible conflict in testimony between Cross and the union official."); *Yaloz Mold & Die Co., Inc.*, 256 NLRB 30, 32 (1981) ("The evidence of a violation herein is so sparse that I find it unnecessary to make any credibility determinations."); *see also Griswold Transport, Inc.*, 1997 NLRB LEXIS 973, *65-*66 (1997); *Local 167, International Union United Automobile, Aerospace and Agricultural Implement Workers of America*, 286 NLRB 1167, 1171-1172 (1987).

Indeed, even the cases cited by the General Counsel recognize that credibility findings need only be made where the decision depends on such findings. *See Alpha-Omega Electric, Inc.*, 312 NLRB 292, 293 (1993) ("This is important in the instant case because the outcome of the case turned on a number of credibility resolutions."); *St. Francis Medical Center*, 347 NLRB 368, n.9 (2006) (*citing Lewin v. Schweiker*, 654 F.2d

631, 635 (9th Cir. 1981) (courts have consistently required explicit credibility findings where such credibility is a critical factor in the decision)).[7]

As discussed *infra*, ALJ Carter properly recognized that *Alan Ritchey* was invalidated and is no longer valid Board precedent and *Fresno Bee* is now the controlling Board law. In *Fresno Bee*, the Board held that an employer does not have an obligation to provide advance notice and an opportunity to bargain with a newly certified bargaining unit (prior to negotiation of an initial collective bargaining agreement) before imposing discipline, irrespective of whether the disciplinary action is discretionary or non-discretionary. Contrary to General Counsel's Exception 1, it was not necessary for ALJ Carter to make detailed credibility determinations and resolve all alleged discrepancies in the hearing testimony. These alleged discrepancies did not affect the ultimate decision – that *Fresno Bee* does not impose an obligation on Baptist to provide advance notice and an opportunity to bargain prior to the imposition of discipline. Rather, *Fresno Bee* is dispositive of the allegations raised in the Consolidated Complaint and eliminated the need to make any credibility determinations. Therefore, General Counsel Exception 1 must be rejected on this basis alone.

Significantly, and contrary to the General Counsel's claim, ALJ Carter did, in fact, resolve conflicting testimony and made credibility determinations where necessary. The Findings of Fact contain a detailed recitation of the facts and ALJ Carter noted in his Decision that, "[t]o the extent that I have made them, my credibility findings are set forth above in the findings of fact for this decision." (ALJD: 8:21-23). In support of these facts, ALJ Carter cited to the testimony of specific witnesses and corresponding sections of the transcript. Clearly, a citation to the testimony of a specific witness

[7] General Counsel Brief at p. 8.

demonstrates that the ALJ credited that particular witness with respect to that testimony. Thus, ALJ Carter did make appropriate credibility determinations – even though the outcome of the Decision did not depend on such determinations – and the General Counsel's Exception 1 must be rejected on this additional basis.

POINT II

ALAN RITCHEY IS NOT CONTROLLING PRECEDENT AND SHOULD NOT BE READOPTED OR APPLIED TO THIS CASE

A. ALJ Carter Appropriately Refused to Apply *Alan Ritchey*

In the Consolidated Complaint, the General Counsel alleged that Baptist violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act") by administratively suspending and subsequently terminating Sparks and Lambert without providing the Union with advance notice and an opportunity to bargain. In support of this contention, the General Counsel relied exclusively on the Board's decision in *Alan Ritchey*, 2012 NLRB LEXIS 854 (2012). The General Counsel's reliance on *Alan Ritchey* is misplaced and ALJ Carter appropriately refused to follow that invalidated decision.

It is undisputed that the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), invalidated *Alan Ritchey*.[8] As a result, *Alan Ritchey* is no longer valid Board precedent and cannot be relied upon to establish a violation of the Act as alleged in the Consolidated Complaint. Instead, the controlling Board precedent is *McClatchy Newspapers, Inc. d/b/a The Fresno Bee* ("*Fresno Bee*") – in which the Board held that an employer does not have an obligation to notify or bargain with the union

[8] The General Counsel's argument that *Alan Ritchey* should be viewed as a decision "reversed on other grounds" is preposterous. There can be no dispute that the *Alan Ritchey* decision was invalidated by the Supreme Court.

prior to imposing discretionary discipline. *See McClatchy Newspapers, Inc. d/b/a The Fresno Bee*, 337 NLRB No. 180 (2002).[9]

In light of the Supreme Court's invalidation of *Alan Ritchey*, ALJ Carter correctly followed well-settled principles of precedent and *stare decisis* and applied *Fresno Bee* in the instant case. *See Dilling Mechanical Contractors, Inc.*, 2011 NLRB LEXIS 453, *72 (2011) ("It is well established that administrative law judges are bound to follow Board precedent unless and until reversed by the Board or the Supreme Court."); *Granite Construction Company*, 330 NLRB 205, 238 (1999) ("[A]dministrative law judges are bound to follow Board precedent unless and until that precedent has been overturned by the Supreme Court or reconsidered by the Board."); *Waco, Inc.*, 273 NLRB 746, 749, n.14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed."); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963) ("[I]t remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.").[10]

ALJ Carter's refusal to apply *Alan Ritchey* is consistent with other Administrative Law Judges who, when faced with the same question presented in this case, properly recognized the invalidation of *Alan Ritchey* and applied *Fresno Bee*. *See, e.g.*, *High Flying Foods*, Case 21-CA-135596 (May 19, 2015) ("With *Alan Ritchey* invalidated,

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[9] Even the *Alan Ritchey* Board expressly recognized that under *Fresno Bee*, "there is no pre-imposition duty to bargain over discretionary discipline." *See Alan Ritchey*, 2012 NLRB LEXIS 854, *48.

[10] The General Counsel's suggestion that an Administrative Law Judge may simply ignore controlling Board precedent he or she believes it to be "demonstrably incorrect" is plainly wrong and would result in chaos.

Fresno Bee . . . has been reinstated as valid precedent and employers do not have an obligation to bargain in situations like the one presented here); *McKesson Corporation*, 2014 NLRB LEXIS 851, *77-*79 (November 4, 2014) ("Now that [Alan Ritchey] has become invalid as a result of the Supreme Court's *Noel Canning* decision, I must follow the law as it existed before *Alan Ritchey* issued."); *Lifeway Foods, Inc.*, 2015 NLRB LEXIS 926 (Dec. 21, 2015) ("Since the Board's decision in Alan Ritchey, Inc., *supra*, has been invalidated by *NLRB v. Noel Canning, Fresno Bee*, *supra*, is the existing Board precedent in this area of the law."); *Security Walls, LLC*, 2016 NLRB LEXIS 38 (Jan. 21, 2016) ("I decline the General Counsel's invitation to apply the rationale of the *Alan Ritchey* decision until the Board adopts that rationale; I am bound by existing precedent."); *Ready Mix USA, LLC*, 2015 NLRB LEXIS 708 (Sept. 15, 2015) ("Even were I to proclaim agreement with the *Alan Ritchey* panel that the rationale of *Fresno Bee* was "demonstrably incorrect," it remains the case that before *Alan Ritchey* there was *Fresno Bee*, and under *Fresno Bee* and its rationale – which was adopted by the Board – the instant allegation of the complaint must be dismissed.").[11]

Based on the foregoing, ALJ Carter properly refused to apply *Alan Ritchey* in the instant case. Accordingly, Baptist respectfully submits that the Board should reject the General Counsel's Exception 2 and adopt ALJ Carter's recommendation to dismiss the Consolidated Complaint.

[11] The General Counsel's reliance on *TGF Management Group Hold Co., Inc.*, 2015 WL 194519 (NLRB Div. of Judges) (Jan. 15, 2015) is misplaced. The discipline at issue in that case was imposed while *Alan Ritchey* was valid and thus there was no that the notice and opportunity to bargain obligations applied to the employer.

B. The *Alan Ritchey* Rationale Should Not Be Re-Adopted

The Board should not readopt the *Alan Ritchey* rationale because it is not consistent with Board precedent or the *status quo* doctrine and would impose an undue and unnecessary burden on employers. In *Alan Ritchey*, the Board held, in pertinent part:

> [a]n employer must provide its employees' bargaining representative notice and an opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees, absent a binding agreement with the union providing a process, such as a grievance-arbitration system, to resolve such disputes.

Alan Ritchey, 2012 NLRB LEXIS 854, at *5.

In doing so, the Board relied on *NLRB v. Katz*, 369 US 736 (1962), for the proposition that, "an employer violates Section 8(a)(5) of the Act by making unilateral changes to represented employees' terms and conditions of employment." *Id.* at *13. However, this reliance was misplaced and the other cases cited by the *Alan Ritchey* Board for its unprecedented expansion of an employer's notice and bargaining obligations are readily distinguishable.

The *Alan Ritchey* Board improperly relied on *Washoe Medical Center*. In *Washoe*, the Board cited to *Oneita Knitting*, 205 NLRB 500 (1973), and held that the employer violated the Act by failing to provide the union with advance notice and an opportunity to bargain over implementation of discretionary wage rates. *See Washoe Medical Center*, 337 NLRB 202, 202 (2001). In a footnote, the *Washoe* Board also affirmed the Administrative Law Judge's dismissal of a complaint that alleged that the employer violated Section 8(a)(5) and (1) by failing to bargain over the imposition of discipline on certain employees because the union did not seek to engage in before-the-

fact bargaining. *Id.* at n.1. Within that footnote, the *Washoe* Board cited to *Oneita Knitting* and rejected the Administrative Law Judge's conclusion that to establish a violation of the Act, "the General Counsel must also demonstrate that imposition of discipline constituted a change in Respondent's policies and procedures." *Id.*

The *Alan Ritchey* Board incorrectly concluded from that footnote that the duty to provide the union with notice and an opportunity to bargain over discretionary wage rates should equally apply to the imposition of discretionary discipline within the confines of an established disciplinary system. *Alan Ritchey*, 2012 NLRB LEXIS 854, *19, *24-*25. That conclusion is not only unsupported by *Oneita Knitting* – a decision that had nothing to do with imposition of discretionary discipline – it is otherwise unsupported by Board precedent holding that an employer does not need to bargain over the implementation of discretionary discipline prior to negotiating a collective bargaining agreement with the union.

In *Wabash Transformer Corp.*, the Board found that the employer did not violate Section 8(a)(5) and (1) where the employer did not provide the union with notice or an opportunity to bargain over the discharge of an employee who failed to meet preexisting efficiency standards. *Wabash Transformer Corp.*, 215 NLRB 546 (1974), *enforced*, 509 F.2d 647 (8th Cir. 1975). In that decision, the Board held:

> It is clear that Respondent did not promulgate new productivity rules or standards, as the existence of the efficiency standards predated the Union's campaign and certification. Furthermore, this is not a case where work rules have been abandoned and subsequently revived and involved.
>
> . . .
>
> Under the above circumstances, we conclude that the discharge sanction was one means of enforcing the

> preexisting efficiency standards which was implicit in the existence of any such standard. The emphasizing of this means did not constitute unlawful unilateral action in violation of Section 8(a)(5) and (1) of the Act.

Id. at 546-47; *see also The Trading Port, Inc.*, 224 NLRB 980, 982-84 (1976) (finding no violation of Section 8(a)(5) or (1) where employer did not provide union with notice and an opportunity to bargain prior to the imposition of discipline for employees failing to meet preexisting efficiency standard).[12]

The cases relied upon by the *Alan Ritchey* Board (as well as by the General Counsel) – *Washoe*, *Eugene Iovine*, 328 NLRB 294 (1999), and *Adair Standish Corp.*, 292 NLRB 890, fn. 1 (1989) – did not involve individual disciplinary decisions. Rather, they involved decisions by employers that affected multiple employees, if not the entire bargaining unit (*e.g.*, reduction in work hours (*Eugene Iovine*), implementation of layoffs (*Adair Standish)*, or setting of wage rates (*Washoe)*). The discretion exercised by the employers in those cases was largely unconstrained. *See, e.g., Eugene Iovine*, 328 NLRB at 294 ("no reasonable certainty as to the timing or criteria for a reduction in employee hours" and "employer's discretion...appeared to be unlimited"); *Adair Standish*, 292 NLRB 890 at fn. 1 (layoff decisions based on employer's subjective judgment of employee ability). In contrast, an employer – such as Baptist – that has established conduct and attendance rules and corollary disciplinary policies and

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[12] Notably, in a brief submitted to the Ninth Circuit during an appellate stage of the *Alan Ritchey* litigation, the Board took the position that *Fresno Bee* was dispositive of this issue and consistent with prior Board law:

> The Board's holding in *Fresno Bee*, that an employer is not required to bargain before the fact about day-to-day disciplinary actions taken pursuant to a preexisting system, is fully consistent with prior Board decisions.

Warehouse Union Local 6, Int'l Longshore & Warehouse Union, 2010 U.S. 9th Cir. Briefs LEXIS 716, n.4 (March 4, 2010). The General Counsel further argued, *Fresno Bee*, "is dispositive and dictates the result" and "[t]he Union attempts to undermine the Board's findings by misreading cases that predate *Fresno Bee*, and by mistakenly relying on factually distinguishable cases." *Id.* at *15.

practices, that has published those rules, policies and practices to employees, and that applies those disciplinary policies and practices when conduct/attendance rules violations occur cannot be said to exercise comparable discretion. The *Alan Ritchey* Board even acknowledged this critical distinction: "the imposition of discipline on individual employees that alters their terms or conditions of employment implicates the duty to bargain if it is unconstrained by preexisting employer policies or practices." *Alan Ritchey*, 2012 NLRB LEXIS 854, at *14 (emphasis added).

The "unique nature of discipline and the practical needs of employers" in this context also cannot be minimized or overlooked. *Id.* at *2. Even where some discretion is involved, disciplines are unlike the other exercises of employer discretion where the Board has mandated bargaining. For one thing, disciplinary action can be expected to occur with much greater frequency than merit-based wage increases, hours reductions, or layoffs. Requiring an employer to provide advance notice and opportunity to bargain prior to each imposition of discipline would be extraordinarily burdensome.

Moreover, it is neither pragmatic nor just to force newly-certified employers to keep an employee who has committed misconduct warranting termination on the schedule and working simply to give the union an opportunity to bargain. In accordance with wage and hour laws, the employer must pay for the time worked. For all practical purposes, these are monies the employer will never recover. Additionally, at least some employees who would have to be kept on the schedule during the notice period and are also now aware that their employer seeks to terminate employment will neglect (if not completely abdicate their duties) and, in some instances, may actively attempt to harm the employer's operations, customers/clients, and/or reputation (*e.g.*, theft; disclosure or

misuse of proprietary/confidential information; property damage). In contrast, post-imposition notice and opportunity to bargain properly balances the legitimate and substantial concerns of employers in maintaining an orderly and productive workplace against all parties' desire for just and fair application of workplace rules.[13]

The *Alan Ritchey* Board's claims that this pre-imposition requirement will lead "to a more even-handed and uniform application of rules of conduct", "a better and fairer result" and "a result the employee is more able to accept" are purely speculative. No supporting facts, statistics, or examples were cited in the decision.[14] In fact, the Board acknowledged that it "was not aware of any evidence that a practice of pre-imposition bargaining has ever been common in workplaces governed by the Act." *Alan Ritchey*, 2012 NLRB LEXIS 854, *49-*50. It further acknowledged that post-imposition bargaining is the "commonplace" method by which disciplinary matters are handled (pursuant to grievance and arbitration provisions in collective bargaining agreements). *Id.* at *50. Given that unions governed by the Act have historically agreed to post-imposition notice and bargaining in their agreements with employers, there is no good reason to impose the undue cost and burden of a pre-imposition notice and bargaining obligation on newly-certified employers.

Tellingly, in the instant case, the Charging Party admitted that it learned of the administrative suspension and termination of Sparks and Lambert shortly after each occurrence, and further admitted that it could have but did not request bargaining with

[13] Unlike when the Act was promulgated 80 years ago, there are countless federal and state laws that protect employees against discriminatory or retaliatory employment actions. Thus, more so than ever, employers have good reason to consistently, fairly, and lawfully apply their policies and procedures.
[14] The *Alan Ritchey* Board's reliance on *First National Maintenance Corp. v. NLRB*, 452 US 666, 668 (1981) is misplaced. The quoted language speaks generally to the benefits of "collective discussions", and not to their timing.

respect any of these actions, much less attempt to present any exculpatory or mitigating evidence or propose alternative courses of action with respect to these individuals – which the *Alan Ritchey* Board touted as the anticipated benefits of the pre-imposition requirements (1/26 Tr. 40-42, 121-127, 131, 217; 1/27 Tr. 378). The Union also admitted that it could have but did not attempt to address Baptist's administrative suspensions and subsequent terminations of Sparks and Lambert during collective bargaining sessions with Baptist (1/27 Tr. 271-272).[15]

Finally, the *Alan Ritchey* Board's rejection of *Fresno Bee* is unwarranted. In *Fresno Bee*, the Board recognized that under *NLRB v. Katz* an employer may not alter existing terms and conditions of employment without negotiating those changes with the union and that employee discipline is "unquestionably a mandatory subject of bargaining." *Fresno Bee*, 337 NLRB No. 180 at 1186. The General Counsel contended that the employer exercised "considerable discretion" in disciplining its employees and the exercise of that discretion required the employer to notify and bargain to impasse with the union over each imposition of discipline. *Id.* The Board, however, found the General Counsel's contention to be untenable and held:

> The variables in workplace situations and employee behaviors are too great to obviate all discretion in discipline.
>
> . . .
>
> The fact that the procedures reserve to Respondent a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy.

[15] The Union further admitted that it requested after-the-fact bargaining during these negotiation sessions regarding attendance-related disciplines that had been issued to other employees and that the parties did in fact engage in negotiations regarding the disciplines (1/26 Tr. 131-132).

The *Fresno Bee* Board agreed that the employer implemented the discipline at issue in that case within the confines of its preexisting disciplinary policy and practices. *Id.* at 1187. Accordingly, the *Fresno Bee* Board further agreed that the employer did not have an obligation to provide advance notice or opportunity to bargain to the union over the discretionary aspects of discipline and did not violate Section 8(a)(5) or (1) of the Act. *Id.*

In rejecting *Fresno Bee*, the *Alan Ritchey* Board held in a conclusory manner that the Administrative Law Judge – whom the *Fresno Bee* Board later affirmed – "misunderstood the Board's case law and failed to explain why discipline should be treated as fundamentally different from other employer unilateral changes in terms and conditions of employment." *Alan Ritchey*, 2012 NLRB LEXIS 854 at *27-*28. The *Alan Ritchey* Board failed to justify how the reasoning of *Fresno Bee* was incorrect and simply changed course by extending *NLRB v. Katz* to apply to employee discipline.

Based on the foregoing, the Board's decision in *Alan Ritchey* conflicts with Board precedent and the *status quo* doctrine and the rationale adopted in that case – which would unduly and unnecessarily burden employers – should not be followed or readopted in the instant case. Rather, *Fresno Bee* should be reaffirmed and followed, which, in turn, compels a finding that Baptist did not violate the Act, requires rejection of the General Counsel's Exception 2, and adoption of ALJ Carter's recommendation that the Consolidated Complaint be dismissed in its entirety.

C. The Board Should Not Apply Alan Ritchey Retroactively

Assuming, *arguendo*, that the Board readopts the rationale in *Alan Ritchey*, it would be manifestly unjust to apply the *Alan Ritchey* decision retroactively in this case. In 2012, when *Alan Ritchey* was decided, the Board refused to apply the decision

retroactively. It noted that at the time of the disciplines at issue (which pre-dated the *Fresno Bee* decision), the law was uncertain as to an employer's notice and bargaining obligation, and thus retroactive application could "catch many employers by surprise and, moreover, expose them to significant financial liability insofar as discharges and other disciplinary actions that could trigger a back pay award are involved." *Alan Ritchey*, 2012 NLRB Lexis 854 at *50. In the instant case, the law was clear at the time of the acts in question; *Fresno Bee* was controlling and did not require advance notice or opportunity to bargain. Baptist indisputably acted in accordance with that controlling precedent.

In his Decision, ALJ Carter properly recognized that applying *Alan Ritchey* retroactively to employers (such as Baptist) would work an injustice:

> [E]ven if the Board were to issue a decision reaffirming its reasoning in *Alan Ritchey*, it seems unlikely that the Board would apply such a decision retroactively to employers (such as Respondent here) that decided to rely on *Fresno Bee* after *Alan Ritchey* ceased to be binding precedent, given that the Board in *Alan Ritchey* applied its decision prospectively to avoid catching employers by surprise.

(ALJD: 9:26-31).

ALJ Carter's decision is entirely consistent with the holdings of other Administrative Law Judges who have had the opportunity to address the same issue. For instance, the ALJ in *High Flying Foods* stated:

> With *Alan Ritchey* invalidated, *Fresno Bee* . . . has been reinstated as valid precedent and employers do not have an obligation to bargain in situations like the one presented here.
>
> . . .
>
> As a practical matter, employers . . . should not be expected to bargain with a union in these circumstances, <u>at a time</u>

> when no valid Board decision imposes an obligation upon them.

High Flying Foods, Case 21-CA-135596 (May 19, 2015) (emphasis added). Likewise, in *Adams & Associates, Inc.*, the ALJ stated:

> However, I am mindful that in *Alan Ritchey* the Board recognized it had not previously explained the duty to bargain over discretionary imposition of discipline and determined that due process required prospective application only. Three of the four discharges involved here post-dated *Noel Canning* and thus occurred when it was clear that *Alan Ritchey* could no longer be relied upon. Under these circumstances, it would work an injustice to require Respondent to adhere to *Alan Ritchey*.

Adams & Associates, Inc., 2015 NLRB LEXIS 463 (June 16, 2015) (emphasis added).

Baptist did not provide the Union with advance notice or an opportunity to bargain over the administrative suspensions and subsequent terminations of Sparks and Lambert based on the fact that *Alan Ritchey* was no longer valid and *Fresno Bee* was the controlling Board precedent (*see* 1/26 Tr. 200-201, 216-217; 1/27 Tr. 378). It would be fundamentally unfair to find that Baptist violated the Act based *Alan Ritchey*. Such a holding would be tantamount to penalizing Baptist for following controlling Board law. Baptist's administrative suspensions and terminations of Sparks and Lambert occurred well after the decision in *Noel Canning* invalidated *Alan Ritchey*. At that time, there was no question that *Alan Ritchey* was no longer valid Board precedent. Under *Fresno Bee*, Baptist did not have an obligation to notify or bargain with the Charging Party prior to the decision to administratively suspend and subsequently terminate Sparks and Lambert and Baptist acted accordingly. Accordingly, Baptist requests that if the Board does readopt *Alan Ritchey* that it only apply its decision prospectively.

POINT III

ALJ CARTER DID NOT NEED TO MAKE A FINDING REGARDING THE DISCRETIONARY NATURE OF THE SUSPENSIONS AND TERMINATIONS OF SPARKS AND LAMBERT BUT, IN ANY EVENT, THE DISCIPLINARY ACTON TAKEN WAS NOT DISCRETIONARY

Fresno Bee does not impose an obligation to provide a newly-certified bargaining unit with advance notice or an opportunity to bargain over disciplinary action, regardless of whether the discipline is discretionary or non-discretionary. Accordingly, because ALJ Carter correctly decided that *Fresno Bee* is the controlling precedent, he did not need to reach the issue of whether Baptist's decisions to administratively suspend and subsequently terminate Sparks and Lambert were exercises of discretion with respect to significant discipline. ALJ Carter also did not need to reach the issue of whether the administrative suspensions at issued constituted disciplinary actions. Accordingly, the Board must reject the General Counsel's Exceptions 3 and 4 and adopt ALJ Carter's recommendation to dismiss the Consolidated Complaint on that basis.

Even if *Alan Ritchey* were to apply, Baptist had no obligation to provide notice and an opportunity to bargain because the disciplinary action taken by Baptist in the instant case was non-discretionary. *See Alan Ritchey*, 2012 NLRB LEXIS 854 at *37 ("[T]he employer has no duty to bargain over those aspects of its disciplinary decision that are consistent with past practice or policy.").

Here, Baptist's decision to suspend Sparks and Lambert pending the outcome of investigations into their respective conduct was not disciplinary in nature. The *Alan Ritchey* Board recognized that employers may place employees on administrative leave pending investigation without advance notice where their alleged actions threaten health, safety, or security in the workplace. *Alan Ritchey*, 2012 NLRB LEXIS 854 at

n.19. As discussed above, Director of Human Resources Jonathan Steffan testified that the administrative suspensions of Sparks and Lambert did not constitute a form of discipline (1/26 Tr. 179, 202-203).

With respect to Sparks, Steffan testified that he placed her on leave during his investigation, in part, to protect patient safety based on the allegation that Sparks acted in an inappropriate and insubordinate manner towards Comerford in front of residents (1/26 Tr. 179-180). With respect to Lambert, Steffan testified (and Lambert acknowledged) that Baptist did not take any disciplinary action against her for the incident that led to her administrative suspension – it simply provided Baptist with an opportunity to investigate the underlying incident (1/26 Tr. 99, 202-203). Because neither of these administrative suspensions was disciplinary in nature, they do not implicate the notice and bargaining requirement under *Alan Ritchey* and cannot be deemed violations of the Act as alleged in the Consolidated Complaint.

Baptist's decision to terminate Sparks was also non-discretionary. The Disciplinary Procedure outlined in Baptist's Employee Handbook explicitly warns employees that certain conduct "will result in immediate termination" including "leaving the property without following proper procedure" (R-3, p. 3-2). This long-standing policy has been in effect at Baptist since at least 2009 – well before the Union was certified at Baptist (1/26 Tr. 154-155). For example, on February 5, 2015, Baptist similarly terminated another CNA for job abandonment (1/26 Tr. 198, R-8). Further, during the hearing, the General Counsel conceded and stipulated that prior to the termination of Sparks, Baptist has terminated other employees for job abandonment (1/26 Tr. 194-195). Steffan unequivocally testified that he was unaware of any instance where a

Baptist employee in a bargaining unit position walked off the job and was not terminated (1/26 Tr. 201) and that "to the best of [his] knowledge, anyone who walks off the job is terminated" (1/27 Tr. 275). When Sparks walked off the job on May 15th without permission, Baptist followed its long-standing policy and terminated her employment.

Because Baptist automatically terminates any employee who walks off the job without permission, this form of discipline is non-discretionary and does not implicate the notice and bargaining requirements under *Alan Ritchey*. Accordingly, even if *Alan Ritchey* had not been invalidated and applied here, it would have been appropriate for ALJ Carter to determine that Baptist did not violate the Act by failing to provide the Union with advance notice and an opportunity to bargain over the termination of Sparks.

Likewise, Baptist's decision to terminate Lambert was also non-discretionary. Baptist has followed a long-standing policy and practice that requires automatic termination of any employee who has two no-call, no-show absences in a one-year period. The Disciplinary Procedure outlined in Baptist's Employee Handbook specifically lists "unexcused absences occurring more than once without prior call in – (No call/No Show)" as one of the forms of misconduct that "will result in immediate termination" (R-3, p. 3-2).

Throughout the hearing, all of Baptist's witnesses testified that CNAs such as Lambert must call-in at least two-hours in advance of his/her scheduled shift (1/26 Tr. 155; 1/27 Tr. 292, 331, 374). These witnesses consistently testified that Baptist's long-standing practice and policy has been to immediately terminate employees who receive more than one no-call, no-show absence in a one-year period (1/26 Tr. 157, 206; 1/27 Tr. 275, 292-293, 331, 374). Steffan specifically stated, "Our practice is very clear.

When someone has two or more no call no shows, there's an automatic termination" (1/27 Tr. 275).

The testimony of Staffing Coordinator Kerri DeMasi and Director of Nursing Melanie Williams regarding the procedure followed by Baptist for terminating an employee with multiple no-call, no-show absences further demonstrated that this practice was non-discretionary. In that regard, DeMasi testified that when an employee receives a second no-call, no-show absence in a one-year period, a supervisor leaves the employee's attendance card on her desk and DeMasi then prepares a stock termination letter that is stored on her computer (1/27 Tr. 332, 348). DeMasi then brings the letter to the Director of Nursing who reviews the attendance card, signs the termination letter, and mails it out (1/27 Tr. 332-333, 348, 375). Baptist exercises no discretion in determining whether termination is an appropriate sanction in those instances. The formula is quite simple, two no-call, no-shows = immediate termination.

During the hearing, neither the General Counsel nor the Charging Party introduced any evidence contradicting the non-discretionary nature of Baptist's established practice. In fact, the General Counsel stipulated that Baptist has terminated other employees for two no-call, no-show absences (1/26 Tr. 206-207). (See R-10).[16] The General Counsel and Charging Party also failed to introduce any credible evidence to demonstrate that Lambert was <u>not</u> a no-call, no-show on April 26th and August 2nd 2015.[17]

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[16] In addition to R-10, the Rejected Exhibit file contains three other examples of instances where Baptist terminated other employees for two no-call, no-show absences in a one-year period (*see* R-11, R-12, and R-13). The ALJ deemed these exhibits to be cumulative in light of General Counsel's stipulation that Baptist has terminated other employees for multiple no-call, no-show absences (1/26 Tr. 206-212).

[17] Staffing Coordinator Kerri DeMasi testified that <u>if</u> she had a conversation with Lambert regarding the absence on April 26, 2015, she would have corrected Lambert's attendance card by placing an "X" over the box for April 26th (1/27 Tr. 341). Lambert's attendance card, however, contains no such notation (1/27

Lambert was specifically aware of Baptist's policy regarding no-call, no-shows. She testified that when she began working at Baptist she was provided with a copy of the Employee Handbook and knew that the Attendance Policy in the Employee Handbook required that she call-in for a scheduled shift at least two-hours ahead of schedule if she was going to miss a shift (1/26 Tr. 96-97). Lambert also acknowledged that if she failed to call-in for a scheduled shift, Baptist would consider her to be a no-call, no-show (1/26 Tr. 98).[18] Because Baptist automatically terminates any employee who has two no-call, no-show absences in a one-year period, this form of discipline is non-discretionary and does not implicate the notice and bargaining requirements under *Alan Ritchey*.

Based on the foregoing, even if *Alan Ritchey* were still the law and did apply, Baptist's decisions to administratively suspend and subsequently terminate Sparks and Lambert were not discretionary. Accordingly, the Board must reject the General Counsel's Exception 3 and Exception 4 and adopt ALJ Carter's recommendation to dismiss the Consolidated Complaint.

POINT IV

ALJ CARTER APPROPRIATELY DECLINED TO ORDER MAKE WHOLE RELIEF OR TO ORDER BAPTIST TO REIMBURSE SPARKS AND LAMBERT FOR SEARCH-FOR-WORK AND WORK-RELATED EXPENSES

In light of ALJ Carter's recommendation that the Board dismiss the Consolidated Complaint, it was appropriate for ALJ Carter not to order Baptist to reinstate Sparks and Lambert, or pay them back pay or search-for-work and work-related expenses. The

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Tr. 341-342, R-16). DeMasi also testified that the notation of the word "sick" next to April 26, 2015 on Lambert's payroll record does not indicate whether Lambert was a no-call, no-show on that day – only that she received sick pay for that day in accordance with Baptist policy (1/27 Tr. 342-344, 365-366; GC-11).

[18] Notably, Lambert admitted that she called in for her shifts on Thursday, July 30th, Friday July 31st, and Saturday August 1st, but did not call-in on Sunday August 2nd (1/26 Tr. 83-85, 104-106).

Board must reject the General Counsel's Exception 5 and Exception 6 on this basis alone.

Even if ALJ Carter had determined that Baptist violated the Act, such relief would be inappropriate. The Board in *Alan Ritchey* only sought prospective relief based on two "practical considerations." *Alan Ritchey*, 2012 NLRB LEXIS 854 at *48-*50. First, the Board noted that the disciplines at issue in that case pre-dated *Fresno Bee* and because prior precedent "did not speak clearly and directly to the issue", "it would not have been unreasonable for the Respondent to believe that it could decline to bargain with the Union without committing an unfair labor practice." *Id.* at 49. Second, the Board recognized that bargaining "commonly" occurred post-imposition of discipline, and thus retroactive application "could well catch many employers by surprise, and moreover, expose them to significant financial liability" with respect to possible back pay awards. *Id.* at 50.

These considerations are equally applicable, if not more so, in this case. Here, the suspensions and terminations of Sparks and Lambert occurred after the Supreme Court invalidated *Alan Ritchey* and reinstated *Fresno Bee* as the controlling precedent. Thus, Baptist had no reason to believe it had an obligation to provide advance notice and an opportunity to bargain to the Union before taking action against Sparks and Lambert. In fact, Baptist acted based on the understanding that it was not obligated under the existing law to provide such notice or opportunity to bargain. (1/26 Tr. 200-201, 216-217; 1/27 Tr. 378). Moreover, no ALJ since *Alan Ritchey* was invalidated has awarded retroactive relief. In addition, the General Counsel's request that the Board

order Baptist to pay Sparks and Lambert for search-for-work and work-related expenses is wholly unsupported by any Board precedent and is inappropriate.

The General Counsel's suggestion that Baptist "was thus on notice of its obligations and chose to simply ignore what it knew the Board would require it to do" (General Counsel Brief at p. 20), is simply preposterous. With the Supreme Court's invalidation of *Alan Ritchey* in 2014, and the fact that the Board elected not to reaffirm this decision, it cannot seriously be argued that Baptist ignored "what it knew the Board would require it to do." As noted above, Baptist relied on, and acted in accordance with, the controlling Board precedent in *Fresno Bee*.

Make whole relief is also inappropriate in this case because neither the Union nor the General Counsel have ever alleged that Baptist unlawfully terminated Sparks and Lambert. In fact, during the hearing, the General Counsel stipulated that this is not an 8(a)(3) case and Sparks and Lambert are not alleged discriminatees, and should be treated as former employee witnesses (1/26 Tr. 45). There is simply no causal connection between the fact that Baptist did not provide the Union with advance notice and an opportunity to bargain and the loss of employment for Sparks and Lambert. Indeed, during the hearing, the Union admitted that after it learned that Baptist had terminated Sparks and Lambert, it failed to request bargaining over this disciplinary action or attempt to offer any exculpatory evidence on behalf of either individual (1/26 Tr. 40-41, 131, 217; 1/27 Tr. 378). The Charging Party and General Counsel also presented no other evidence to demonstrate that the Union took any steps to challenge the merits of the underlying termination decisions. Accordingly, even if it is determined that Baptist violated the Act, the General Counsel's request for retroactive make-whole

relief in this case is entirely inappropriate and unjust and must be denied. Therefore, the Board must reject the General Counsel's Exception 5 and Exception 6.

CONCLUSION

Based on the foregoing, Respondent Baptist Health Nursing and Rehabilitation Center, Inc. respectfully requests that the National Labor Relations Board issue an Order rejecting the General Counsel's Exceptions to the Decision of the Administrative Law Judge; adopt the recommended Order of the Administrative Law Judge; and affirm dismissal of the Consolidated Complaint; together with such other and further relief as the Board deems just and proper.

Dated: April 22, 2016

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BAPTIST HEALTH NURSING AND REHABILITATION CENTER, INC.

and

Case 03-CA-153365
Case 03-CA-160251

1199SEIU UNITED HEALTHCARE WORKERS EAST

AFFIDAVIT OF SERVICE

I hereby certify that on April 22, 2016, I electronically filed Respondent' s Brief in Response to General Counsel's Exceptions to the Decision of the Administrative Law Judge with the National Labor Relations Board using the NLRB E-Filing system, and served a signed PDF of the same by e-mail to the following:

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